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In the Supreme Court of the United States

OCTOBER TERM, 1980

NARVA HARRIS CONSTRUCTION CORP.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the Court of Claims incorrectly held that the Department of Housing and Urban Development did not breach a contract in refusing to increase the amount of mortgage insurance covering two construction projects completed by petitioner.

1. Petitioner, a general contractor, entered into negotiations in 1970 with Center Post Housing, Inc. (Center Post), the Presbyterian-University of Pennsylvania Medical Center (Medical Center), and representatives of the Department of Housing and Urban Development (HUD) regarding construction of the Center Post Housing Project and renovation of the Kemble Park Apartments, two low-income housing developments in Philadelphia (Pet. App. 26). The Center Post project was to be financed by a federally insured mortgage loan to Center Post, a wholly-owned

subsidiary of the Medical Center (*id.* at 23, 31-33). The maximum insurable mortgage was determined by HUD from figures supplied in part by petitioner (*id.* at 27, 31-32).

Prior to signing the contract, petitioner told HUD officials that the approved insurable mortgage was insufficient to complete the project (Pet. App. 26-27). At a meeting attended by petitioner, the Medical Center and HUD officials in April 1971, HUD officials explained that under applicable regulations there were only two ways the insured mortgage amount could be increased (*id.* at 28). One was by means of "change orders," which were used on three occasions to increase the amount of approved mortgage insurance on the Center Post project.[1] The other method for raising insurance limits, called "error in processing," is utilized when HUD makes a computational error that goes unnoticed during initial review procedures (*id.* at 28-29). As for this second method, the court below noted (*id.* at 29):

> The record includes the referenced error in processing regulations. These regulations, which are unpublished but are routinely made available to an interested party on request, expressly disapprove mortgage insurance increases to compensate for additional costs except where necessary to "correct substantial error in the original processing" * * *.

On May 18, 1971, Narva Harris, one of the petitioner's three owners, wrote a letter to counsel for the Medical Center, stating in part (Pet. App. 31):

> We agreed at * * * [the April meeting] that [HUD] would probably compensate us for any excess when the job is completed based on our certified costs. In the

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[1]The approved mortgage insurance amount was increased to cover the costs of changes in construction specifications calling for air conditioning, window guards and fire extinguishers (Pet. App. 29).

> event they do not, however, we agreed that the Hospital would guarantee me the difference provided I agreed to lower the builder's fee by 1 percent, thereby absorbing my share of the overage.

On September 1, 1971, petitioner entered into a contract with Center Post to construct the Center Post Housing Project (Pet. App. 32). After the project was completed, it was discovered that the certified costs exceeded the amount of the insured mortgage (*id.* at 34). Center Post requested that HUD raise the mortgage insurance amount to reflect the increased cost of the project (*id.* at 35). HUD denied this request (*id.* at 36).

2. Petitioner brought two companion suits against HUD, each alleging breach of contract in connection with one of the two construction projects, in the Court of Common Pleas of Philadelphia County. The suits were removed, on the government's motion, to the United States District Court for the Eastern District of Pennsylvania, which subsequently transferred them to the United States Court of Claims pursuant to 28 U.S.C. 1406(c). Following trial, that court found that petitioner's claim relating to the Kemble Park Apartments renovation "must fail because of an almost complete failure of proof" (Pet. App. 17). No evidence was adduced to "indicate that cost overruns were in fact experienced, [or that] HUD was even asked, much less refused to insure a mortgage larger than that approved for the project at its inception" (*ibid.*). As for the Center Post project, the court found that the evidence shows "both (1) that no HUD official promised [petitioner] that cost overruns on the Center Post housing project would be accommodated by an increase in the insured mortgage by which the project was originally funded, * * * and (2) that, accordingly, [petitioner] looked to Center Post, not HUD, to indemnify it against the impact of cost overruns on its

fixed-price contract" (*id.* at 18). "In sum," the court concluded, "the evidence does not show that HUD's failure to insure increased mortgages on either of the construction projects involved in those two consolidated cases amounts to a breach of contract" (*ibid.*).[2]

3. The Court of Claims correctly rejected petitioner's fact-bound contentions, holding that petitioner "has failed to prove the making of the oral contract which has been alleged and which is the necessary basis for any possible recovery in this court" (Pet. App. 40). Further review is therefore unwarranted.

Petitioner first contends (Pet. 4-10) that the Court of Claims made a factual error in not finding that certain HUD officials stated or implied that if there were a certified cost overrun HUD would increase the level of mortgage insurance. The court below found no credible evidence in the record to support petitioner's assertion (Pet. App. 29), and such a factual issue does not warrant further consideration by this Court.[3] However, even assuming arguendo that the representations alleged by petitioner were made by the HUD officials, the court was nonetheless correct in finding no breach of contract. Such an increase in the mortgage insurance amount is not sanctioned by the applicable regulations (*ibid.*), and it is well settled that the federal government is not bound or estopped by the statements of

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[2]Two other counts in each of the petitions below, dealing with issues not here relevant, were ultimately transferred to the United States District Court for the Eastern District of Pennsylvania, pursuant to 28 U.S.C. 1506 (Pet. App. 40).

[3]Similarly, petitioner's contention (Pet. 12-13) that it "adduced sufficient evidence from which a meeting of the minds could reasonably be inferred to support a finding of a contract implied-in-fact" (*id.* at 12) relates to the sufficiency of the evidence presented, an issue not warranting review by this Court.

its agents made outside the scope of their lawful authority. See, *e.g., Schweiker* v. *Hansen*, No. 80-1162 (Apr. 6, 1981).

Petitioner next asserts (Pet. 8-10) that the government was equitably estopped from denying the existence of the contractual agreement. The Court of Claims found, however, that petitioner did not prove that it relied on any conduct of HUD officials (Pet. App. 37). During the contract negotiations, petitioner expressly sought assurance from the Medical Center that if HUD did not grant the mortgage increase the Medical Center would guarantee the difference (*id.* at 31). As the court below correctly noted, petitioner's letter to the Medical Center "dispels the notion that [petitioner] undertook the project in reliance on a solid expectation that if its actual costs exceeded its projections [HUD] would increase its mortgage guarantee to make up the difference" (*ibid.*).

Finally, petitioner argues (Pet. 11) that "an unenforceable oral contract does not prevent a recovery in *quantum meruit* for the value of services rendered." However, in order to recover in *quantum meruit*, petitioner must show performance of additional services in excess of those required of it by the terms of an existing contract with the government. *Allstates Van Lines Corp.* v. *United States*, 215 Ct. Cl. 1075 (1978). Petitioner never had a contract with the government. The contractual agreement executed by petitioner with Center Post specified petitioner's compensation and set forth the terms upon which Center Post, not the government, would provide additional compensation due to increased costs. Furthermore, petitioner's completion of the housing project was not "in excess" of the services required of it by its contract with Center Post (*ibid.*). Hence, this argument as well must fail.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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